FOR ARGUMENT

No. 94-197

(18)

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; AND RUSSELL S. GOULD, DIRECTOR, CALIFORNIA DEPARTMENT OF FINANCE,

Petitioners,

vs.

DESHAWN GREEN, DEBBY VENTURELLA, AND DIANA P. BERTOLLT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' BRIEF ON THE MERITS

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Petitioners, Eloise Anderson, Director, California Department of Social Services, the California Department of Social Services, and Russell S. Gould, Director, California Department of Finance, ("California") reply to respondents' brief on the merits as follows:

ARGUMENT

I

CALIFORNIA'S STATUTE DOES NOT OPERATE AS A PENALTY ON MIGRATION AND THEREFORE MUST BE UPHELD IF IT HAS A REASONABLE BASIS

Unhappy with the welfare reform authorized by the California Legislature in its enactment of California Welfare and Institutions Code section 11450.03 ("the Statute"), respondents here (plaintiffs below, "plaintiffs") challenge the Statute on constitutional grounds.

The issue here is not whether California's statute represents good public policy: the issue is, instead, the level of scrutiny by which the constitutionality of the Statute is to be adjudicated. Plaintiffs' brief on the merits is rife with their arguments that the Statute is not good public policy. However, such arguments are irrelevant. The issue here is whether or not the Statute should be subjected to a strict scrutiny analysis. As stated by plaintiffs on page 22 of their opposition brief on the merits, the relevant questions are therefore whether the Statute has the purpose of impeding travel as its primary objective, whether the Statute penalizes the exercise of the right to travel, and whether it actually deters travel. California's Statute does none of the above.

As noted in California's opening brief on the merits, the primary objective of the Statute is not to impede travel. As there is no purpose expressed in the Statute itself, as plaintiffs' exhibits do not reflect applicable legislative history, and as the principal effect of the Statute is to conserve limited state resources, it is clear that the

purpose of the Statute is to conserve California's scarce financial resources for all of its citizens.

On its face, the Statute does not erect effective and purposeful barriers to insulate California from indigents in the form of either criminal penalties or complete denials of public assistance. There is nothing in the terms of the Statute which would impede an indigent person from traveling to California. Thus, the words of the Statute make clear that the primary purpose of the Statute is *not* to impede travel.

Nor does the Statute penalize travel. The Statute does not deny welfare benefits outright, as was condemned in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Statute does not create *permanent* distinctions based on the length of state residency as were struck down in *Zobel v. Williams*, 457 U.S. 55 (1982) (size of payments from oil revenues dependent upon years of residence in Alaska), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (property tax exemptions based on state residency before a specific date), and *Attorney General of New York v. Soto Lopez*, 476 U.S. 898 (1986) (preferences for veterans based on length of state residency). The Statute explicitly provides that persons subject to the Statute receive *at all times* a constitutionally permissible amount of AFDC benefits: either what they received, or would have received, in their prior state of residency, or (after one year of residency) the full amount of the California grant.

Thus, it cannot be said that the Statute penalizes the right to travel as persons subject to the Statute are not deprived of the basic necessities of life. As noted above,

the Statute neither denies nor delays eligibility for AFDC benefits; to the contrary, it provides for a constitutionally permissible amount of AFDC benefits upon arrival in California, assuming all other conditions of eligibility are met. The Statute has no impact on the receipt of Medicaid benefits and, in fact, increases the amount of Food Stamps issued to persons subject to the Statute. Thus, California still provides a "safety net," offering the basic necessities of life.

The Statute's effect on travel is remote and incidental, at best. The Statute neutralizes the level of public assistance available in California as a factor in a person's decision to move to California. By having no effect on eligibility for welfare, the Statute imposes no penalty on interstate migration. Those impacted by the Statute still receive a constitutionally permissible level of public assistance. As with all people contemplating a change in their state of residence, public assistance beneficiaries must make decisions on where to live based, in part, on how far their dollars will go in their new home. With a state as large as California, newcomers to California may stretch their dollars depending on where they decide to settle within California.

All arguments of plaintiffs and their supporting amici relating to the high cost of living in California are irrelevant. As noted on page 17 of California's opening brief on the merits, it is constitutionally permissible for a state to set a benefit level below that state's standard of need. *Dandridge v. Williams*, 397 U.S. 471, 480, 483 (1970). The effect of so doing is a political decision vested in that state's legislature, and is not to be subjected to scrutiny by the judiciary. *Dandridge*, 397 U.S. at 482.

Finally, the Statute has not been shown to actually deter travel. Plaintiffs have not shown any person who was actually deterred from traveling to California because of the Statute's enactment.

The Statute does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution as it is free from invidious discrimination against suspect classes. Thus, California need only show that the Statute is rationally related to a legitimate state interest. *Zobel v. Williams*, 457 U.S. 55, 60 (1981). This is the standard by which legislation involving the administration of public benefits is evaluated. *Dandridge*, 397 U.S. at 487.

Plaintiffs erroneously argue that the Statute has no rational purpose. The purpose of the Statute is to save government expenditures. When implemented, the Statute will save government expenditures. This is a legitimate state purpose. Plaintiffs argue that, in their opinion, the Statute does not save enough money to survive a rational basis inquiry. Plaintiffs do not state how much money the Statute would have to save in order to survive such inquiry, nor can they. The answer to that question is a policy decision left to the discretion of the California Legislature and not to plaintiffs and not to the judiciary.

II

PLAINTIFFS MAY NOT RELY UPON MATERIALS REGARDING PROPOSITION 165 OR UPON MATERIAL NOT PRESENTED TO THE DISTRICT COURT TO SUPPORT THEIR ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE STATUTE

Plaintiffs argue that the purpose of the Statute is analogous to other proposed legislative schemes

evidenced by materials plaintiffs submitted in support of their motion for preliminary injunction. These materials deal with California Proposition 165, a voter initiative that did not become law, and California Senate Bill 366 which also was not enacted into law. These materials are irrelevant to this Court's consideration of the Statute, as neither Proposition 165 nor Senate Bill 366 is a precursor of the Statute.

Accordingly, it is inappropriate for plaintiffs to rely on their Exhibits 1 (JA22), 5 (JA20), 8, 9, 10, 11 (JA31), and 13 (CR 69) because the precursor of Welfare and Institutions Code section 11450.03, i.e., the Statute, was Senate Bill 485. (Respondents' Brief on the Merits, p. 6.) Plaintiffs' exhibits are not part of the legislative history of Senate Bill 485. It is similarly inappropriate for plaintiffs to rely upon materials relating to California Proposition 165 (JA 20, 24, 61 and 99) as this proposition was turned down by the California electorate. It is also inappropriate for plaintiffs to rely upon materials in the *Beno v. Shalala* case currently pending before the district court, as those materials were filed after the hearing in front of the district court in this case (JA 121). Documents or letters not presented to the district court are not part of the record on appeal. *U.S. v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

Also, plaintiffs' exhibits are not competent evidence. While affidavits in support of a preliminary injunction need not fit all of the requirements of affidavits in support of a motion for summary judgment, 11 C. Wright and A. Miller, *Federal Practice and Procedure, Civil*, § 2949, p. 471 (1973), the materials in the referenced exhibits are not affidavits, verified pleadings, or transcribed deposition

materials. The exhibits clearly are not competent evidence.

Flynt Distributing Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) noted that the urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The court held that the trial court may give even inadmissible evidence some weight when to do so serves the purpose of preventing irreparable harm before trial. However, the court in *Flynt* was dealing with a prohibitory injunction, i.e., one which merely maintained the status quo, and not with a mandatory injunction such as that sought by plaintiffs in this case. Therefore, this Court should not consider the referenced exhibits because they are not properly authenticated, they are hearsay to the extent they purport to be testamentary in nature, and they clearly are not relevant.

Proposition 165, Assembly Bill 671, the Governor's Budget as analyzed by the Legislative Analyst, and Senate Bill 366 did not become, and are not now, the law of the State of California. They are not relevant legislative history for the Statute at issue here which did become law in California.

The California Supreme Court was presented with a similar situation in the case of *Delaney v. Superior Court*, 50 Cal.3d 785 (1990). There, the court was called upon to determine the electorate's intent in passing a constitutional amendment by initiative which shielded a reporter from contempt proceedings in refusing to answer questions about unpublished information. Delaney, who was

seeking the information, argued that the court should look to the legislative history of California Evidence Code section 1070 to determine the intent of the voters in passing the Constitutional amendment. The court responded:

> "The history, however, is of no help in that regard. Article I, section 2(b) is plain on its face, and we need not – indeed, should not – search for external indicia of the voters' intent. (Citation.) Moreover, the *legislative* history of section 1070 could, as a matter of logic, reflect only the *Legislature's* intent. [fn. omitted.] That history would not provide us with any guidance as to *the voters'* subsequent intent because none of the indicia of the Legislature's possible intent (committee analysis and digest and letters from the statute's author) were before the voters."

Id., at p. 801, emphasis in original.

Plaintiffs' analysis is even more absurd. They rely on materials regarding an attempted amendment to the California Constitution, which was not passed, and other legislative materials which did not result in final legislation, to establish the intent of the California Legislature which passed the Statute. This Court should not be so detained. The absurdity here is even more pronounced since the ballot materials and the legislative analysis of *unpassed* bills do not reflect any legislative intent.

Finally, the Statute does not require resort to any materials for an understanding of its provisions. It means exactly what it says. There is no purpose expressed and none of plaintiffs' materials reflect applicable legislative

history. The purpose of the Statute is to conserve California's scarce financial resources for all of its residents.

III

CALIFORNIA'S STATUTE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

Although neither the district court nor the Ninth Circuit addressed this issue, plaintiffs contend that the Statute violates the Privileges and Immunities Clause of Article IV of the United States Constitution by substantially interfering with the right to migrate interstate. Plaintiffs primarily rely on *Zobel v. Williams*, 457 U.S. 55 (1982) as authority for their position that the Statute violates the Privileges and Immunities Clause. Plaintiffs misread *Zobel*, as they rely entirely on Justice O'Connor's concurring opinion, in which no other justice joined. Justice O'Connor's viewpoint is not reflected in the opinion of the Court. In *Zobel*, this Court rejected a privileges and immunities claim against an Alaska statute by which the state distributed income derived from its natural resources to the adult citizens of the state in varying amounts based on the length of each citizen's residency, stating:

> "The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.' "

Zobel, 457 U.S. at 60 n.5, citing *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

Cases which uphold the application of the Privileges and Immunities Clause to statutes that treat persons differently on the basis of state residency, such as *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Doe v. Bolton*, 410 U.S. 179 (1973); *United Building and Construction Trades v. Mayor*, 465 U.S. 208 (1984); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); and *Austin v. New Hampshire*, 420 U.S. 656 (1975), all do so on the basis that an actual nonresident is involved. Cases which discuss the application of the Privileges and Immunities Clause, but do not uphold the application of it, such as *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 388 (1978) and *Paul v. Virginia*, 7 U.S. (8 Wall.) 168 (1869), also analyze the issue in terms of a distinction between residents and nonresidents. In contrast, this case involves only California residents.

A clear statement of the scope of the Privileges and Immunities Clause is found in *Toomer* in which the Court stated that the clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." 334 U.S. at 396.

Like the state law at issue in *Zobel*, the Statute does not discriminate between residents of California and residents of other states. In order to receive AFDC benefits in California, a person must be a resident of California. Welfare and Institutions Code section 11105. Therefore, the Privileges and Immunities Clause has no application to this case and does not afford grounds for invalidation of the Statute.

IV

THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY AND IS NOT MOOT

Plaintiffs have argued both in their opposition to the petition for writ of certiorari (pp. 19-21) and now in their brief on the merits (p. 49) that this case is moot. California fully addressed this argument in its Reply to Opposition to Petition, pages 5-7. In brief, the Ninth Circuit order vacating the federal waiver necessary to implement the provisions of California's Statute is not a final judgment on the merits, but only an order granting a preliminary injunction and specifically instructing the District Court to remand the federal waiver request to the federal officials for further consideration. Thus, because the issues in this case are likely to recur and the underlying question persists, the controversy presented by this case is not moot. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968).

CONCLUSION

California is attempting to bring innovative solutions to a pressing national concern – welfare reform. As part of its attempt to fix a system which works for neither the states nor for the recipients, California (with federal approval) is attempting to experiment with a variety of changes to the current system of administering of AFDC benefits. The reasonable discretion of California to improve this system has been stymied by unwarranted strict scrutiny.

As with other statutes involving the administration of public benefits, the constitutionality of the Statute should be analyzed under the rational basis standard. Strict scrutiny is not the proper standard to be used because the right to travel is not penalized by operation of the Statute. At most, the only impact the Statute has on the right to travel is remote and incidental.

This Court should reverse the judgment of the Ninth Circuit and remand this case with instructions that the preliminary injunction be dissolved and the complaint be dismissed.

Dated: December 28, 1994

Respectfully submitted,

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